United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1048

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

APR 28 1975

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EARL FODDRELL
APPELLANT,

against

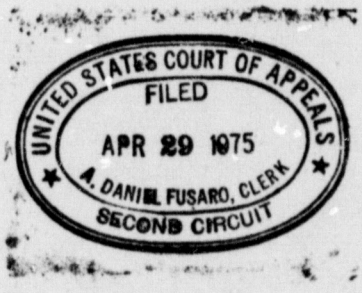
UNITED STATES OF AMERICA

NUMBER: 75-1048

To be argued by Robert Leighton

SUPPLEMENT BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, (GAGLIARDI, J)



Earl Foddrell, Pro se

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EARL FODDRELL
Appellant

against

UNITED STATES OF AMERICA
Appellee.

DOCKET NUMBER 75-1048

SUPPLEMENT BRIEF

Appellant Earl Foddrell files this Supplement motion to his attorney's Appeal pursuant to Rule____of Appellant procedures. Appellant is filing without the aid of a transcript from a Judgment of Conviction rendered in the United States District Court for the Southern District of New York, the Honorable Judge Gagliardi. Appellant was convicted after a trial by jury and sentenced to a term of imprisonment of ten (10) years and a six (6) year special parole to commence upon expiration of his confinement and the sentences are to run currently to those imposed under Indictment 73-Cr-229.

Pursuant to Rule____, Federal Rules of Appellate Procedure, Appellant petitions this Court's permission to supplement his attorney's 'Brief on Record' timely filed. Appellant Foddrell would strongly urge that points in questions I, III, IV and V would require more than Summary consideration by the Court. Appellant claims that the questions I, III, IV and V involves questions of exceptional importance.

The exceptional importance of this case on question: (Point I) in the Argument of Appellant's Attorney Brief (page 12)):

> I. Whether the Trial Judge who had seen Appellant's pre-sentence report at the conclusion of the prior trial should have disqualified himself from presiding over the present trial in order to avoid any potential prejudice.

To consider this argument in Appellant's favor would show that fundamental and substantial rights were denied, and further proof of pre-judgment would show forth in the sentencing minutes of July 31, 1973 11:30 a.m. before the Trial Court. Also at the same time a motion for the reduction of sentence pursuant to Rule 35 Federal

Rules of Criminal Procedure had been pending before the same trial judge for___months and was ruled on less than a month (October 25, 1974) before Appellant's trial began (November 20, 1974), thus granting to him a one (1) year reduction in sentence, and the total impact of recusal should be held forth due to the fact that a 'Motion to Vacate Sentence' pursuant to Title 28 U.S.C., 2255 was submitted and docketed by the same trial Judge on Criminal Indictment 73-CR-229 before trial (Nov. 20 to 27, 1974) was to proceed in this case. This motion to vacate, was also pending before the Court when the U.S. Probation Office stated that the Court would use the pre-sentence report from the last sentence, this motion to vacate Appellant's sentence on 73-Cr-229 was also pending before trial Court during the months preceeding the sentencing of Appellant on current conviction by the same trial Court.

Title 28 U.S.C., Section 144 provides:

> "Bias or prejudice of Judge whenever a party to any proceeding in a district Court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party. Such Judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding....."

Title 28 U.S.C., Section 455 provides:

> "Interest of Justice or Judge: Any Justice or Judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been counsel, or has been a material witness, or is so related to.....as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Appellant states that on November 18 , 1975, Counsel for Appellant, Mr. Bobick requested that the Court disqualify itself. (Min of 11/18/74, p. 4-5). The recusal of a federal Judge may be either voluntary, where a Judge himself believes the fair administration of Justice would be furthered by recusal and does so on his own motion, or mandatory where required by statutes, premised upon Title 28 U.S.C., Sections 144 and 455.

The dictates of the fifth and Sixth Amendments Constitutional rights to a fair trial and Code of Judicial Conduct which states:

> "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding:

American bar Association Special Committee on Standards of Judicial Conduct, Code of Judicial Conduct, Cannon 3(C)(1)(1972)

Appellant was before the trial Judge previcus when the trial Court listened to eleven days of wiretaps hearings, that resulted in a plea of Guilty. Trial Court comments on facts surrounding pre-sentence report at the July 31, 1973 sentencing min. pages 2, 4, 5 and 6 would factually tend to show that reason cannot control the subsconscious influence of feelings of which it is unaware. The facts would tend to show that the Trial Judge had further awareness and judgment when it reduced his sentence from twelve (12) years to eleven (11) years.

Appellant states, it is true in cases during the course of a trial a Judge inevitably will assess the credibility of witness, react to the evidence presented and ultimately determine in his own mind the guilt or innocense of defendants. However the pre-sentence report of defendants and in this case, the Appellant, was used improperly by the same Judge who presided over the trial of 'four months' earlier.

A pre-sentence investigation is mandatory in the federal system unless the Judge directs otherwise.

The Federal Rules of Criminal procedure, Rule 32(C) 18 U.S.C.A. mandates this. This rule was violated by the United States Probation Officer for Southern District of U.S. District Court New York, when it only asked two questions during its interview and then stating that was the only information needed, since his office already had access to the earlier pre-sentence report that was used before the same trial Judge in the same trial Court four months earlier.

There is evidence pending from that first trial that would not fulfill the requirements of Rule 11 of F.R.Cr.Pro., yet the fact that, the trial Judge must be aware a bargain was made. Since this is so, and the pre-sentence report from Cr. Indictment 73-229 is before, then appellant asks this Court to consider the price

he has paid for the exercise of his right to a fair trial.

Even in view of the prohibitions the Supreme Court has laid down against making the exercise of Fourth (See SIMMONS vs U.S., 390 U.S. 377, 389-394, 88 S.Ct. 967, 19 L.Ed 2d 1247 (1968); Fifth (See GARDNER vs BRODERICK, 392 U.S. 273, 276 88 S.Ct. 1913. 20 L. Ed 2d 1082 (1968), SPEVACK vs KLEIN 385 U.S. 511, 515 87 S.Ct., 625 17 L.Ed. 2d 574 (1967), and Sixth (U.S. vs JACKSON, 390 U.S. 570 581-585 88 S.Ct. 1209, 20 L.Ed 2d 138 (1968) Constitutional rights costly, the pricetag thus placed on Appellant's right to fair trial which these amendments guarantee would, on first impression seem clearly impermissible.

In U.S. vs SMALL 472 F.2d 818 at 820-821 (1972), the issue of both trial Judge recusal and possibility of prejudice by trial Judge through the premature reading of presentence report was considered giving a Supreme Court interpretation of Rule 32 of Federal Rules of Criminal Procedure. This ruling (GREGG vs U.S. 394 U.S. 489 89 S.Ct 1134 22 L.Ed 442 (1969) admitted no exceptions in the rule's admonition that the trial Judge should not see the presentence report before a jury returns its verdict.

For example, in U.S. vs WOMACK, 454 F.2d 1337 (5th Cir. 1972) the Appellant was tried separately by the same judge who presided over the trial of Appellant's co-conspirators.

During the trial of the co-conspirators, the Judge characterized the Appellant as a 'shady character' and told the Jury that if one of the co-conspirators was guilty, "There is no question but that (Appellant) would be as culpable." id. at 1341. Although this prejudgment of Appellant's guilt arose from a judicial proceeding, the Court held that it satisfied the 'personal bias' standard of Section 144 U.S.C., 28 and reversed the conviction.

With regard to this due process right, the Supreme Court has said that "Justice must satisfy the appearance of Justice." OFFUTT vs U.S. 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed 11, (1954) and "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. COMMONWEALTH COATING CORP. vs CONTINENTAL CASUALTY CO.,

393 U.S. at 150, 89 S.Ct. at 340 21 L.Ed 2 301 (1968). Viewed in the light of these general principles, the particular allegations in this case entitle appellant to relief.

POINT III

The Court's refusal to grant Appellant's application for a severance deprived him of his due process right to a fair trial.

Byrd's counsel opening statement to the open Court implicating Appellant in the crime and raised the question of criminality on Appellant's part, was of such prejudicial error, that without being properly instructed, it was possible for the Jury to transfer guilt from one to another and to find defendants guilty..... U.S. vs VARELLI 407 F.2d 735, 747 (1969). Trial Court further erred in failing to allow Byrd to take the stand to be cross-examined as to truthfulness or credibility. In ALFORD vs U.S., 282 U.S. 692 51 S.Ct. at 219 (1931): the ALFORD COURT SAID:

"Counsel often cannot know in advance, what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory and the rule that the examinee must indicate the purpose of his inquiry does not, in general apply.

In SMITH vs ILLINOIS 390 U.S. 129 131 88 S.ct. at 750 (1968), the Court stated:

"When the credibility of a witness is in issue, the very starting point in 'exposing falsehood-and bringing out the truth' through cross-examination must necessarily be to ask the witness, who he is and where he lives. The witness' name and address open countless avenues of in-court examination. To forbid this most redimentary inquiry at the threshhold is effectively to emasculate the right of cross-examination itself."

In DAVIS vs ALASKA No. 72-5794, 42 L.W., the Court stated:

"The Sixth Amendment of the Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witness against him. This right is secured for defendants in state as well as federal criminal proceedings under POINTER vs TEXAS, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the vitness, physically. Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of Cross-examination." DOUGLAS vs ALABAMA, 380 U.S. 415 418 (1965).....

"Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested."

The error by the Court in not granting severance is biased to the point Appellant's counsel defense was hampered by the uncon-

tested allegations and assumptions being unconscously on the jury and trial court's minds. In GREEN vs MCELROY 360 U.S. 477 496, the Court said:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of memory whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance prejudice or jealousy, we have formalized these protections in the requirements of confrontation and cross-examination...360 U.S., at 496.

The Court denial of severance motion by Appellant, effectively denied him of the right of confrontation as guaranteed under the Sixth Amendment U.S. Const. Amend. VI: BRUTON vs UNITED STATES 391 U.S. 123 (1968). With such similarity as in BRUTON where the co-defendant did not take the stand, the same is true that Appellant Foddrell could not cross-examine Byrd of the statements implicating him.

The substantial damage that was done by Byrd's attorney, using hearsay statements in his opening, to the Jury and Court, could not have been cured unless appellant was granted a severance and a chande to cross-examine Byrd so that the Jury, in being the sole Judge of the credibility, would have a better line of reasoning presented to it. Without the severance, without Byrd taking the stand so that his statements, attributed to him by his attorney, cross-examined, then the jurors were denied, even though they were entitled to, have the benefit of appellant's defense theory brought before them so that they could make an informed Judgment as to the weight to place on Byrd's testimony which provided a crucial link in the proof of Appellant's act. This opening statement by Byrd's attorney was a crucial and key element in the Government's case Appellant; and the claim of bias which Appellant's defense wanted and sought to develope through accuracy and truthfulness was denied him when the trial Court refused a severance, thus denying the right of effective cross-examination which was a 'constitutional error of

the first magnitude and no amount of showing of want of prejudice could cure it.

In the circumstances of this case, the Sixth and Fourteenth Amendments conferred the right of severance and to cross-examine Byrd, deal with the history of Indictments and its affects.

POINT IV

The Prosecutor's summation was so prejudicial and inflammatory that it deprived Appellant of his right to a fair trial.

Appellant's claim that the prosecutor committed various prejudicial errors in the trial of his case, should be substained in his favor due to the over zealousness of the prosecutor.

The Supreme Court in BERGER vs U.S., 295 U.S. 78 88 55 S.Ct., 629 633 79 L.Ed 1314 (1935) stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very deninite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocense suffer. He may prosecute with earnestness and vigor..indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful confiction as it is to use every legitimate means to bring about a just one." See also FONTAINE vs CALIFORNIA 390 U.S. 88 S. Ct. 1229, 20 L.Ed 154 (1968); ANDERSON vs NELSON, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed. 2d 81 (1968); GRIFFIN vs STATE OF CALIFORNIA 380 U.S. 609 85 S.Ct. 1229, 14 L.Ed 2d 106 (1965): and COLLINS vs UNITED STATES 383 F.2d 296 (10 Cir. 1967).

POINT V

Since the 15 months delay between the date of the alleged crime and Appellant's arrest prevented him from effectively preparing his defense, the indictment should be dismissed.

Appellant urges this Honorable Court that pursuant to the Rules of this Circuit Rule 50(b) of Federal Rules of Criminal Procedure, the Sixth Amendment speedy trial Clause, Rule 48(b) of Federal Rules of Criminal Procedure and the due process Clause of the Fifth Amendment to dismiss this indictment against him.

The Appellant was indicted by seal indictment September 19, 1973. On Sept. 20, the indictment was ordered unsealed by Judge Duffy and Appellant was brought before Court on Beanch warrant,

and pleaded Not Guilty. The case was then assigned to Judge Tenny. On April 13, 1974 Government filed notice for readiness for trial. Appellant on April 19, 1974 filed motion for dismissal of indictments as to Counts One (1) and Count Two (2).

Judge Tenny dismissed Count 1 and denied dismissal on Count 2. Opinion filed #40637. Trial was then assigned to Judge Gagliardi, who had confronted and tried Appellant on an earlier and similar chage. Appellant charges that the indictment of Count 2 should be dismissed in light of the peculiar circumstances of this case. The peculiarity that on the 1st day of January 1972 and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York, the Appellants or defendants--as the Grand Jury charges in Criminal Indictment 73-Cr-869 is the exact same language and information in Count II of Criminal Indictment 73-Cr-229 which reads, "On or about the 1st day of January 1972, up to and including the date of the filing of this indictment in the Southern District of New York, the Appellant did commit certain acts. In fact, Count 1 of 73-Cr-229 states dates such as May 26, 1972, June 10, 1972 and July 1, 1972, to show forth the facts that the Governmental official intentionally delayed arresting of Appellant. Even though in Criminal Indictment 72-Cr-229 he pleaded guilty was sentenced and in Federal custody. "The Sixth Amendment which guarantees to all persons a speedy trial is intended to prevent prejudice to the 'defendants' ability to present an effective defense. U.S. vs MARION 404 U.S. 307, 320 (1971). It also protects the accused from the emotional distress that results from 'uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to the one he is presently serving--uncertainties that a prompt trial removes,' STRUNK vs U.S., 412 U.S. 434 439 (1973). Once there has been a determination, after consideration of the factions prescribed by the Supreme Court in BARKER vs WINGO 407 U.S. 514 (1972), that a defendant's Sixth Amendment rights to a speedy trial has been denied the remedy in-

variably is dismissal of the charges or indictment with prejudice. STRUNK vs U.S. SUPRA 412 U.S. at 439-40; U.S. vs PROVOV, 350 U.S. 857 (per curiam) also Denial of a defendant's Sixth Amendment right to a speedy trial requires dismissal of the indictment. MOORE vs ARIZONA, 414 U.S. 24 (1973) (per curiam).

This Court, must take into consideration that the government at all times knew the whereabouts of Appellant, that the F.B.I., Files, the U.S. Bureau of Prison Files at the West Street Federal Detention Center were at their access, even the Court files. The government plainly had an interest in the tardy disposition of case since he had originally plead not guilty on 73-Cr-229, and had been released on bond. Yet the government's responsibility for delay in Appellant's case, however extends even further, for the prosecution made no effort what so ever to accelerate trial on 73-Cr-869 even while he was incarcerated, furthermore the allegedly overt acts happened on or about June 13, 1972 allegedly before and after some of the allegedly overt acts in 73-Cr-229.

The trial in 73-Cr.-229 was ended in a plea of Guilty on April 2, 1973 with Appellant being sentenced on July 31, 1973 and his incarceration commencing on October 1, 1973. Thus for the Government, to say that material to bring this case to trial is pure and erroneous prefabrication and a violation of Appellant's Sixth Amendment rights.

In U.S. vs ANDREW FUREY No. 467-Sept. Term 1974 (2 Cir) (Decided Feb. 25, 1975: The Second Circuit panel said:

> "Moreover, we find it difficult to imagine drafting an effective Plan for the Prompt Disposition of Criminal Case without the sanction of dismissal with prejudice. Such a provision is, in our view, necessary to put teeth into the scheming. See: KILBERT vs DOOLING, SUPRA 476 F.2d at 358-59. If the government prosecutor is not faced with complete and absolute discharge of the defendant upon failure to diligently prosecute, he will be less likely to live up to, the spirit, and letter of the Plan, See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, Approved Draft, 1968, 40-41. Additionaly the defendant, may suffer more from dismissal and reindictment than from one continuing indictment (Albeit for a long period).....
>
> In view of these considerations, we do not believe that Rule 50(b) was intended to limit or prevent the use of dismissal with prejudice....."

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CERTIFICATE OF SERVICE

It is hereby certified and witnessed that on the ____ day of _____, 19 ____, the undersigned ~~did hand to the~~ will mail

~~Federal Parole Officer~~ _____,

at the Federal Penitentiary, Lewisburg, Pennsylvania, a copy of

SUPPLEMENT BRIEF TO APPELANT'S BRIEF NO. 75-1048 (Earl Foddrell for

mailing, postage prepaid, on the same day ____ of _____,

19 ____, to THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOLEY SQUARE, NEW YORK, 10007 _____.

Earl Foddrell
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME THIS

23 DAY OF April, 1975. #76700

W Baetzel
FEDERAL PAROLE OFFICER

Parole Officer authorized by Act of July 7, 1955, to administer oaths (18 U.S.C. 4004)

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And in conclusion, of the four factors to be assessed in determining whether Appellant has been deprived of his right to a speedy trial, three are met conclusion, reason of delay, the defendant assertion, and prejudice to the defendant. The length of delay is to be decided in Appellant's favor, see ROBERTS vs UNITED STATES, No. 836 Sept. Term 1974 Decided April 9, 1975).

Considering all the facts, circumstances, rules of this Circuit and law involved in Points I, III, IV, and V, Appellant moves that this Supplement for the conviction to be reversed and the indictment dismissed and on Point II a hearing should be ordered.

Respectfully submitted,

Earl L Foddrell

SUBSCRIBED AND AFFIRMED BEFORE ME THIS 23 DAY OF APRIL, 1975.....

W Bastress

UNITED STATES PAROLE OFFICER

Parole Officer-Authorized by Act of July 7, 1955 to administer oaths (18 U.S.C. 4004-1)